

347

# The C A S E of *Mary Kinsey*, Widow, Administratrix of *Sir Thomas Kinsey*, Kt. Plaintiff, against *Henry Hayward*, Executor of *John Hayward*, Defendant, upon a Writ of Error in Parliament.

*London.* **T**He said Plaintiff in the Court of Common Pleas declared, That *John Hayward*, the 5th, of *August*, 1682. was indebted to *Thomas Kinsey* in 50 *l.* lent, to be paid on Request; And on another Promise, the 4th of *February*, 1692, on an Account stated.

Defendant pleads that Testator did not promise within 6 Years before the Plaintiff sued out the Original Writ.

Plaintiff replies, That her Intestate, 8th of *May*, 4 *Jac.* 2. sued an Original Writ in Trespass against *John Hayward*, directed to the Sheriff of *Dorsetshire*, intending according to the Course of the Court, to declare for this Debt; but the Defendant appeared not, and 1st of *April*, 1693, dyed: Whereupon, Intestate forthwith sued another Writ in Trespass, 12th of *April* in the 5th Year of the late King and Queen (which was 1693) against the Defendant to the same Intent, but he appeared not, and the Plaintiff's Intestate the 5th of *February*, 8th of the late King *William* dyed, and Administration was committed to the Plaintiff: And she the 29th of *April*, 9th of the said late King *William*, sued out the Original Writ in this Cause; and the Defendant appeared, and the Plaintiff declared against him, and avers, That the Cause of Action accrued within 6 Years before the first Writ sued by her Intestate, and that the Parties are the same.

Whereto the Defendant demurs generally, and Judgment for the Plaintiff, and Writ of Inquiry, and 75 *l.* Damages, assessed by the Jury and final Judgment thereon, in the Common Pleas, and of that a Writ of Error brought in the King's Bench, and General Errors assigned, and the Judgment in the Court of Common Pleas reversed.

This Cause was argued three several times in the Court of Common Pleas, by several Counsel on both Sides, and the great Question there, was, Whether this Action was barred by the Statute of Limitation, or not, the first Original being only in Trespass, and in another County than that where the Action is laid.

To which, it was answered, and adjudged by the late Lord Chief Justice *Treby*, and other Judges of that Court, who gave their Opinions *seriatim*, resolved, That this Action was not barred within the Intent and Meaning of the Statute, which was made to prevent dormant Rights, where Parties do not pursue them in some reasonable Time, but not to destroy old Rights where no Fault is in the Party to pursue them.

And as to the Objection, That the first Writs in this Case were in Trespass, and in another County, and therefore could not be taken to have the Effect of Originals in this Action.

It was answered, and resolved, That it was the constant and allowed Course of that Court, That when a Man sues a Writ in Trespass, when the Defendant appears, the Plaintiff may charge him with any Action in any County as he pleased, and, that therefore, such Writs were to be looked on as Originals in such Actions till the Defendant appeared.

It was further objected, That the Originals in the Plaintiff's Replication, were not said to be returned by the Sheriff, nor the said Writs to be continued till the Death of the Parties: To which it was answered, That the common Return on all those Writs, is only, that the Defendant hath nothing whereby he can be attach'd, and that in this Case it ought to be presumed, they were returned and continued, unless the contrary had been shewn, being a frivolous Matter purely of Form, that they were never known to be returned by the Sheriff, but by any Attorney at his Chamber: And that it being shewn the Originals were discontinued by the Death of Parties, and so could not be continued longer; if they had been discontinued sooner, the Defendants should have shewn they were discontinued, and that they were not returned, and that the reciting the Returns by the Sheriff, and the Continuances of the Writs would have made the Pleadings of a vast Length, to no manner of Use or Purpose, besides that the Practice of the Court was to the contrary, not to make such Recitals.

Notwithstanding such Judgment of the Court of Common Pleas, yet the Court of King's Bench reversed this Judgment.

This Cause has been five Years depending, tho' closely followed all that time, the Plaintiff has been at a very great Charge in prosecuting the same; even to as much as the Debt, to obtain her Judgment: And the Judges of the Court of Common Pleas having declared, That the Proceedings in that Court have been Proper and Regular: The Plaintiff humbly hopes that a Judgment so solemnly obtained there, for a just Debt, will be supported by this Supreme Court of Judicature; and the rather, for that the Judges of that Court, having the Records of the Court before them, and the Officers of the Court always ready to inform them, do best know what the Practice of that Court is, and can best judge if they find it convenient, and for the ease and Benefit of Suitors.

*John Pratt.*

Wherefore it is humbly prayed, That the said Judgment of Reversal may be reversed, and that the Judgment of the Court of Common Pleas may be affirmed, that the Plaintiff may have her just Debt and Costs.